

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  OFFICE OF CONSUMER ADVOCATE,  Petitioner,  vs.  LCR TELECOMMUNICATIONS, L.L.C.,  Respondent.	DOCKET NO. FCU-02-26 (C-02-322)
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**ORDER DENYING MOTION FOR RECONSIDERATION**

(Issued August 5, 2003)

On December 16, 2002, the Consumer Advocate Division of the Department of Justice (Consumer Advocate) filed with the Utilities Board (Board) a petition for a proceeding to impose civil penalties pursuant to Iowa Code § 476.103, asking that the Board review the proposed resolution issued in C-02-322, involving LCR Telecommunications, L.L.C. (LCR), and consider the possibility of assessing a civil penalty pursuant to Iowa Code § 476.103(4)"a." On June 24, 2003, the Board issued an order reviewing the record assembled in the informal complaint proceedings and denying the request for a proceeding to consider imposing civil penalties against LCR.

The record showed that the Board received a complaint from Dr. Jerry Gibson alleging that his preferred carrier service was changed from OneStar

Communications, L.L.C. (OneStar), to LCR without proper authorization. Dr. Gibson named AT&T Communications of the Midwest (AT&T), Qwest Corporation (Qwest), OneStar, Alliance Group Services, Inc. (Alliance), and LCR as the companies potentially involved in the slam. On September 24, 2002, Board staff forwarded Dr. Gibson's complaint to AT&T, Qwest, and OneStar for responses.

On September 24, 2002, Qwest responded to Dr. Gibson's complaint. Qwest stated that its records indicate that Dr. Gibson's long distance carrier, OneStar, was changed by Alliance on July 30, 2002.

AT&T responded to Dr. Gibson's complaint on October 2, 2002. AT&T stated that its records indicate an order was placed with the local telephone company, Qwest, by another long distance carrier and that AT&T did not initiate any change in Dr. Gibson's carriers.

OneStar responded to the complaint on October 9, 2002. OneStar acknowledged that it was the preferred long distance service provider for Dr. Gibson. OneStar stated that its records indicate that on July 30, 2002, OneStar was notified that it had been canceled as the preferred carrier for Dr. Gibson due to a subsequent order submitted by a different provider.

On October 8, 2002, Board staff forwarded Dr. Gibson's complaint to Alliance for response. Alliance responded to the complaint on October 15, 2002, stating that the preferred carrier change order for Dr. Gibson's account was ordered at the direction of LCR. Alliance stated that it provides underlying transmission capacity to LCR, but is in no way involved with LCR's marketing or sales.

On October 23, 2002, Board staff forwarded Dr. Gibson's complaint to LCR for response. LCR responded to the complaint on November 13, 2002, stating that it received authorization for the switch from Dr. Gibson's office manager, Jodi Plower, on July 19, 2002. LCR included a copy of the third-party verification recording with its response. LCR further indicated that Dr. Gibson's account was issued a credit of \$27.72 on November 4, 2002, and was canceled out of its system on October 28, 2002.

On December 6, 2002, Board staff issued a proposed resolution describing these events and proposing that the credit offered by LCR and the reassessment of the change in carrier charges by Qwest to LCR, represented a fair resolution of the situation. The parties were allowed 14 days to appeal the proposed resolution. No party other than Consumer Advocate has challenged the staff's proposed resolution within the time period allowed.

The Board denied Consumer Advocate's request for the imposition of civil penalties against LCR on June 24, 2003, finding that Consumer Advocate had not provided any reasonable ground for further investigation of the matter.

On July 9, 2003, Consumer Advocate filed a motion for reconsideration. In the motion, Consumer Advocate asserted five individual bases for reconsideration. Each issue raised by Consumer Advocate will be addressed below.

**1. Consumer Advocate did address the proposed resolution.**

Consumer Advocate asserts that the Board was in error when it stated its June 24, 2003, order that Consumer Advocate's "request for proceeding to impose civil penalties fails to address the proposed resolution . . ." Order, p. 4. Consumer

Advocate supports this assertion by citing specifically to paragraphs 10 and 11 of its request for proceeding to impose civil penalties where the term “proposed resolution” was used once in each paragraph.

The Board acknowledges that Consumer Advocate mentioned the proposed resolution in its initial request. However, Consumer Advocate’s petition failed to provide any specific, substantive reasons as to why the proposed resolution was incorrect or to provide reasonable grounds for further investigation. It was Consumer Advocate’s failure to address these aspects of the proposed resolution which prompted the Board’s statement in its June 24, 2003, order.

**2. The Consumer Advocate did request a specific remedy.**

Consumer Advocate states that the Board was in error when it stated in its June 24, 2003, order that “[t]he request for proceeding to impose civil penalties fails . . . to request, or even suggest, any specific remedy beyond what has already been done.” Order, p. 4. Consumer Advocate asserts that the reason for its request was to suggest the specific remedy of a civil monetary penalty.

While it is undisputed that Consumer Advocate’s intent in filing its request was to seek the remedy of civil penalties against LCR, Consumer Advocate failed to explain why the proposed decision was inappropriate and why civil penalties should be considered in this case. It was Consumer Advocate’s failure to support its requested remedy with evidence from the record which prompted the Board’s statement in its June 24, 2003, order.

**3. Credits alone are an insufficient response to the problem.**

Consumer Advocate asserts that crediting a customer's account for the cost of a slamming or cramming error is insufficient to curb the violations. Consumer Advocate supports this assertion by citing to a customer letter from a different case and suggesting that "[s]mall credits of unlawful charges have not done the job in the past." "Motion for Reconsideration," p. 5.

Despite Consumer Advocate's argument that credits to a customer's account are insufficient to deter unauthorized changes in telephone service, data obtained by the Board's Customer Service Section indicates an approximate 50 percent decrease in slamming incidents since the start of 2003 when compared to prior-year data. It appears that this significant decrease in slamming incidents may be, at least in part, due to customer credits. Consumer Advocate's statement that credits "will not do the job in the future" ("Motion for Reconsideration," p. 5), fails to recognize this improvement in the number of slamming complaints received to date.

**4. Proceedings for civil monetary penalties need not and should not require formal state investigations.**

Consumer Advocate asserts that formal proceedings are not necessary for the Board to impose civil penalties against violators of the unauthorized change of service laws. In support of this assertion, Consumer Advocate states that the Board has broad authority to effect the purpose of the laws it administers. Iowa Code § 476.2(1). Consumer Advocate analogizes slamming and cramming violations with speeding or traffic violations, stating that minor administrative hearings could be scheduled "a couple of weeks after" a violation occurs to resolve the matters with reasonable promptness.

First, Consumer Advocate appears to ignore the Board's established procedures regarding formal complaint proceedings outlined in 199 IAC 6, which apply to these complaints pursuant to 199 IAC 22.23(7). Upon the filing of a request for formal complaint proceedings or request for civil penalties following a proposed resolution, it is Board procedure to assign a formal complaint proceeding (FCU) number to the request. Consumer Advocate chose to file this petition for reconsideration under the informal complaint proceeding docket number, which is no longer applicable to this case. This failure to comply with established Board procedures presents a risk of improper filing of the request and, as a result, presents the possibility that the Board may inadvertently fail to rule on a motion if Consumer Advocate persists in misfiling its requests. Consumer Advocate is under the same obligations as other parties before the Board and needs to follow the same established procedures as are required of other parties.

Second, Consumer Advocate's analogy between slamming and cramming violations and traffic offenses is inappropriate. Slamming and cramming violations do not have an established schedule of fines, as do traffic offenses. To levy civil penalties under existing Board rules requires an exercise of judgment based on the evidence in the record. To fairly exercise this judgment as required by statute, a hearing must be held to allow the parties due process. This process becomes expensive and taxes the limited resources available to the Board. It is for this reason that Iowa Code § 476.3 and the Board's rules require a showing of reasonable grounds for further investigation in situations, such as the one at issue here, before conducting an administrative proceeding, including a hearing, to determine whether

civil penalties are appropriate remedies. Consumer Advocate failed to provide such a showing.

If the Board had unlimited resources, this scenario might be different, but that is unrealistic and irrelevant. The Board has limited resources and, therefore, must strive to use them efficiently. Docketing every single slamming or cramming complaint for hearing, or even for a “notice and opportunity of hearing,” is not an efficient use of those limited resources.

**5. Consumer Advocate is a proper petitioner.**

At page 7 of its motion, Consumer Advocate asserts that by stating in the Board’s order at page 4, that “[n]o party other than Consumer Advocate has challenged the staff’s proposed resolution,” and “[t]he customer’s failure to challenge the proposed resolution indicates that the customer is satisfied with the resolution and does not wish to pursue this matter any further,” the Board is suggesting that Consumer Advocate is not a proper petitioner in this case.

The June 24, 2003, “Order” contains no language addressing the question of whether Consumer Advocate is a proper petitioner and the Board did not state in this docket that Consumer Advocate is not a proper petitioner. In other dockets, the Board has indicated that a customer’s decision not to challenge the proposed resolution is an indication to the Board that the customer does not wish to pursue the matter any further. This is a reasonable inference from the customer’s silence.

In this case, the customer sent a letter to Board staff indicating that he was satisfied with the credit to his account, but that he would support any efforts by the Board to deter future slamming occurrences by LCR. While this letter was sent within

the 14-day time period allowed for appeals of the proposed resolution, the letter neither challenged nor requested an appeal of the proposed resolution; it merely indicated his support for the Board's efforts in the deterrence of future slamming incidents.

Finally, as a point of clarification, Consumer Advocate is a proper petitioner in this matter, but it must allege a case it can reasonably be expected to prove.

### **ORDERING CLAUSE**

#### **IT IS THEREFORE ORDERED:**

The "Motion for Reconsideration" filed by the Consumer Advocate Division of the Department of Justice on July 9, 2003, is denied as described in the body of this order.

#### **UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 5<sup>th</sup> day of August, 2003.